Supreme Court, U.S.
FILED
SEP 27 1999
OFFICE OF THE CLERK

No. 99-361

IN THE
Supreme Court of the United States

LARRY S. SMITH AND ALL SYRUPS, INC.,

Petitioners,

v.

MULTI-FLOW DISPENSERS OF OHIO, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT P. DUCATMAN
JONES, DAY, REAVIS & POGUE
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

GREGORY G. KATSAS
(*Counsel of record*)
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondent Multi-Flow Dispensers of Ohio, Inc.

1688

QUESTION PRESENTED

Whether the courts below properly dismissed an actual monopolization claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, for failure to either plead or proffer sufficient evidence of a relevant product market.

PARTIES TO THE PROCEEDINGS

All parties below are listed in the caption. Respondent Multi-Flow Dispensers of Ohio, Inc. has no parent corporation or publicly held company that owns 10 percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Allen-Myland, Inc. v. IBM Corp., 33 F.3d 194 (3d Cir.), *cert. denied*, 513 U.S. 1066 (1994) 7

Brown Shoe Co. v. United States, 370 U.S.24 (1962) 5, 6, 7, 10

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992) 8, 9

H.J., Inc. v. ITT Corp., 867 F.2d 1531 (8th Cir. 1989) 7

International Boxing Club of New York, Inc. v. United States, 358 U.S. 242 (1959) 7, 10

NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984) 9

Redmond v. Missouri Western State College, No. 84-6139, 1988 WL 142119, (W.D. Mo. Nov. 2, 1988) 9

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) 6

Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Va., Inc., 714 F.2d 351 (4th Cir. 1983) 7

Smalley & Co. v. Emerson & Cuming, Inc., 808 F. Supp. 1503 (D. Colo. 1992), *aff'd*, 3 F.3d 366 (10th Cir. 1993) 8

T. Harris Young & Associates, Inc. v. Marquette Electronics, Inc., 931 F.2d 816 (11th Cir.), *cert. denied*, 502 U.S. 1013 (1991) 4, 5, 8, 9

Tarrant Service Agency, Inc. v. American Standard, Inc., 12 F.3d 609 (6th Cir. 1993), *cert. denied*, 512 U.S. 1221 (1994) 2

TABLE OF AUTHORITIES (cont'd)

Page

United States Anchor Mfg., Inc. v. Rule Indus., Inc.,
7 F.3d 986 (1994) (11th Cir. 1993),
cert. denied, 512 U.S. 1221 (1994) 7

United States v. Continental Can Co.,
378 U.S. 441 (1964) 7

United States v. E.I. du Pont de Nemours & Co.,
351 U.S. 377 (1956) 5, 6, 7, 9, 10

United States v. Paramount Pictures,
334 U.S. 131 (1948) 10

United States v. Philadelphia Nat'l Bank,
374 U.S. 321 (1963) 10

White & White, Inc. v. American Hospital Supply Corp.,
723 F.2d 495 (6th Cir. 1983) 7

Statutes

15 U.S.C. § 2 1

Miscellaneous

P. Areeda, *Antitrust Law* (1996) 7

STATEMENT OF THE CASE

Petitioners seek review of an unpublished court of appeals opinion unanimously affirming an unpublished district court opinion dismissing an actual monopolization claim for failure either to plead or to proffer sufficient evidence of a relevant product market. The court of appeals opinion decides no significant legal questions, but reflects only a straightforward application of settled market definition principles. Moreover, the petition for certiorari does not allege any circuit conflicts, and it is meritless. Further review in this Court is therefore unwarranted.

1. Respondent Multi-Flow Dispensers of Ohio, Inc. sells beverage products and services, including flavored syrups and dispensing equipment, to retail businesses in the Cleveland, Ohio metropolitan area. Petitioner Larry Smith is a former sales representative of respondent. In January 1990, Smith formed petitioner All Syrups, Inc., a competing beverage wholesaler. Petitioners then began a campaign of meritless and unsuccessful litigation against respondent. Pet. App. A2-A3.

In October 1990, petitioners filed a complaint against respondent and nine other defendants in the Court of Common Pleas of Cuyahoga County, Ohio. That complaint alleged various state antitrust violations, as well as claims for conversion, tortious interference of contract, and several other claims. After discovery, the antitrust and conversion claims were dismissed on the merits with prejudice, and the remaining claims were later dismissed for failure to prosecute. Pet. App. B14 & n.3.

In June 1993, petitioners filed another complaint against respondent in the United States District Court for the Northern District of Ohio. That complaint alleged an actual monopolization claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, as well as pendent state antitrust, conversion, and tortious interference claims. Pet. App. B1. For purposes of the Sherman Act claim, the complaint alleged at least three

distinct and contradictory product markets: "carbonated" beverages and related services; "carbonated" beverages and related services sold "to taverns and restaurants"; and "off-brand" beverages and related services sold "to restaurants and taverns." Pet. App. A3-A4. The alleged geographic market was the Cleveland metropolitan area. *Id.*

2. In February 1995, after discovery, respondent filed a motion for summary judgment. Pet. App. A3, B2. Respondent argued that summary judgment was appropriate because, among other reasons, petitioners had failed to identify a single relevant product market. Pet. App. B8.[1] In response, petitioners abandoned the product markets alleged in their complaint and, in their brief in opposition, alleged a fourth product market: beverages and related services ("regardless of brand and carbonation") sold "to bars and restaurants." Pet. App. B8-B9.

The district court granted the motion for summary judgment in part and denied the motion in part. The court accepted petitioners' redefined product market and concluded that the evidence about that market was genuinely disputed. The court therefore denied summary judgment on the Sherman Act claim. Pet. App. B9-B11. The court also denied summary judgment

---

[1] Respondent also explained why, as a matter of law, none of the three product markets alleged in the complaint could support monopolization liability under Section 2. The alleged "off-brand" market, opportunistically defined to eliminate all competing sales of dominant national brands such as Coca Cola and Pepsi, was deficient under controlling circuit precedent, *see Tarrant Service Agency, Inc. v. American Standard, Inc.*, 12 F.3d 609, 615 (6th Cir. 1993), *cert. denied*, 512 U.S. 1221 (1994), holding as a matter of law that generic products compete against their brand-name counterparts. R. 67 at 11-18, CA6 App. at 1640-47. Moreover, under the other two market definitions alleged in the complaint, respondent would have a market share of under 18% — an amount that could not possibly support an inference of monopoly power. R. 67 at 18-19, CA6 App. at 1647-48.

on the conversion and tortious interference claims (Pet. App. B11-B13), but granted summary judgment on the state antitrust claim (Pet. App. B13-B14). Finally, the court granted summary judgment based on the preclusive effect of the prior state-court dismissal, but only with respect to conduct alleged to have occurred before October 1990. Pet. App. B14-B16.

3. Following the district court's summary judgment order, petitioners filed an amended complaint that changed their product market allegations yet again. The amended complaint alleged that the relevant market was beverages and related services sold "'to taverns and *locally-owned* restaurants in metropolitan Cleveland.'" Pet. App. C6 (quoting amended complaint) (emphasis added).[2] The amended complaint did not allege that the beverages and related services provided to locally-owned restaurants are different in any way from those provided to regionally-owned or nationally-owned restaurants. Pet. App. A2. On the contrary, it affirmatively alleged that all of these restaurants purchase "identical" beverage products. Pet. App. A10. Petitioners' market allegations thus focused not on distinctions among products, but on distinctions among sellers and buyers. Specifically, petitioners complained that many locally-owned restaurants purchased beverage products from respondent, whereas many regionally-owned and nationally-owned restaurants purchased the "same" products directly from large national manufacturers such as Coca Cola and PepsiCo. Pet. App. A9-A10.[3]

---

[2] Petitioners' purported justification for filing the amended complaint was "'to remove any doubt'" about what market they had previously alleged. Pet. App. A4. In fact, however, the product market alleged in the amended complaint was far narrower than the product market that petitioners had previously alleged in opposing summary judgment. Pet. App. A4-A5.

[3] In attempting to so distinguish among sellers and buyers, petitioners apparently recognized that, if competing sales by Coca Cola and PepsiCo

Respondent moved to dismiss the amended complaint for failure to state a claim. Respondent argued that the market alleged in the amended complaint excluded, without justification, "substantial numbers of potential customers — specifically, non-locally owned restaurants." Pet. App. A5. After an initial round of briefing on the motion to dismiss, the district court indicated that it was inclined to grant the motion, but invited petitioners to file a supplemental memorandum in opposition. In that memorandum, petitioners asked the court to consider the evidentiary materials previously submitted in connection with the summary judgment motion. *Id.*

4. The district court granted the motion to dismiss the amended complaint. The court concluded that, "'[w]hile a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the product sold to those customers.'" Pet. App. C7 (quoting *T. Harris Young & Associates, Inc. v. Marquette Electronics, Inc.*, 931 F.2d 816, 824 (11th Cir.), *cert. denied*, 502 U.S. 1013 (1991)); *see also id.* ("differentiating between 'larger' and 'smaller' customers, rather than alleging product or service distinctions, is invalid as a matter of law"). Applying that principle, the court concluded that the amended complaint did not adequately allege a relevant product market:

> The Complaint does not allege any facts that support limiting the relevant market to locally-owned establishments. The Complaint does not even allege that providing beverage dispensing equipment and syrups to locally-owned establishments is in fact distinct and non-competitive from providing the same services to non-locally-owned establishments.

Pet. App. C8.

---

were considered, petitioners could not possibly establish that respondent had monopoly power in the relevant beverage markets.

The district court further held that summary judgment would be proper even if it were to consider the evidentiary material previously submitted by petitioners. Those materials consisted primarily of two affidavits, from petitioner Smith and his expert, alleging as yet another relevant product market "'the bar and restaurant market *serviced by Multi-Flow*.'" Pet. App. C9-C10 (quoting affidavits). The court concluded that that this alleged market also was invalid as a matter of law, because "[a] relevant market includes all products that are reasonably interchangeable — not simply the customers of a company." Pet. App. C10.

5. In a unanimous and unpublished opinion, the court of appeals affirmed. In conducting its product market analysis, the court of appeals considered both the "reasonable interchangeability" and "cross-elasticity of demand" criteria established by this Court in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-404 (1956), as well as the "practical indicia" later identified in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Pet. App. A7-A8. The court reasoned that "identical" products are *a fortiori* "interchangeable," and must therefore be included within the same product market. Pet. App. A10. Accordingly, the court concluded that "an antitrust plaintiff may not narrow a relevant product market to a select group of customers without identifying a difference in the *product* supplied to that group of customers." Pet. App. A11 (emphasis in original) (citing *T. Harris Young*, 931 F.2d at 824). Because petitioners had identified no difference in the beverage products supplied to the various restaurants at issue, the court concluded that petitioners' attempted exclusion of regionally-owned and nationally-owned restaurants from the relevant product market amounted to an impermissible attempt "to define the relevant market in terms of Multi-Flow's own customer base." *Id.*

REASONS FOR DENYING THE WRIT

Petitioners seek review based on their remarkable claim that, even though locally-owned and other restaurants purchase the *same* beverage products from wholesalers, the products purchased by locally-owned restaurants constitute a *different* market from the products purchased by regionally-owned and nationally-owned restaurants. Petitioners allege no circuit conflicts, and they advance no other sound reason why this Court should consider such a transparently meritless claim.

1. In their questions presented (Pet. i) and argument headings (Pet. iii-iv), petitioners suggest that this case raises basic issues about the proper role of reasonable interchangeability, cross-elasticity of demand, and "practical indicia" in an analysis of the relevant product market. No such question is presented. For over four decades, it has been clear that products must be included within the same relevant market if they are "reasonably interchangeable." *See, e.g., du Pont*, 351 U.S. at 394-404. Both the court of appeals (Pet. App. A7) and the district court (Pet. App. C4) recognized this principle. It is equally clear that one important measure of interchangeability is the "cross-elasticity of demand" between the products at issue. *See, e.g., du Pont*, 351 U.S. at 394-95. Both the court of appeals (Pet. App. A7) and the district court (Pet. App. C4) recognized this principle as well. Finally, it is clear that the seven "practical indicia" identified by this Court in *Brown Shoe* (370 U.S. at 325) also can serve as important "evidentiary proxies for direct proof of substitutability." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 479 U.S. 1033 (1987). Both the court of appeals (Pet. App. A8) and the district court (Pet. App. C5-C6) also recognized this principle.[4]

---

[4] In emphasizing *Brown Shoe's* "submarket" terminology (Pet. 23), petitioners perhaps intend to suggest that the analyses of "practical

Far from calling these basic principles into question, the decision below reflects only their straightforward application. Under *du Pont* and its progeny, defining a product market involves assessing the extent to which *different* products are reasonably interchangeable, and thus fall within the *same* relevant market. *Compare United States v. Continental Can Co.*, 378 U.S. 441, 449-53 (1964) (metal and glass containers are reasonably interchangeable) *and du Pont*, 351 U.S. at 394-404 (cellophane and other forms of "flexible packaging material" are reasonably interchangeable) *with International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 249-50 (1959) (championship boxing and nonchampionship boxing are not reasonably interchangeable). The *same* product, however, cannot fall within *different* markets. As the court of appeals recognized, "identical" products (Pet. App. A10) are

---

indicia" and of reasonable interchangeability are distinct. However, petitioners cite no authority for this suggestion, which the lower courts have overwhelmingly rejected. *See, e.g., Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 208 n.16 (3d Cir.) ("submarket" terminology "is somewhat confusing," because "relevant market" and "submarket" are coextensive), *cert. denied*, 513 U.S. 1066 (1994); *United States Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 995 (11th Cir. 1993) ("defining a 'submarket' is the equivalent of defining a relevant product market for antitrust purposes"), *cert. denied*, 512 U.S. 1221 (1994); *H.J., Inc. v. ITT Corp.*, 867 F.2d 1531, 1540 (8th Cir. 1989) ("the same proof which establishes the existence of a relevant product market also shows (or . . . fails to show) the existence of a product submarket"); *White & White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495, 502 (6th Cir. 1983) (*Brown Shoe* "utilized the submarket indicia to more precisely answer the standard 'reasonable interchangeability' inquiry"); *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Va., Inc.*, 714 F.2d 351, 355 n.5 (4th Cir. 1983) ("relevant market" and *Brown Shoe* "submarket" are coextensive); P. Areeda, *Antitrust Law* ¶ 533, at 172-73 (1996) ("[S]ubmarket indicia are best viewed as 'proxies for cross-elasticities of supply and demand, and thus the identification of a submarket is in principle no different than the identification of a relevant market.'" (citation omitted)).

by definition "reasonably interchangeable" (351 U.S. at 395) within the meaning of *du Pont*. Further review is unnecessary to confirm that tautology.

Petitioners likewise err in complaining (Pet. 22-23) that the court of appeals failed to analyze cross-elasticity of demand. Any such analysis presupposes the existence of *different* products. As this Court recently explained, a "cross-elasticity of demand" measures the "extent to which consumers will change their consumption of *one* product in response to a price change in *another*." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 469 (1992) (emphases added). Having correctly concluded that the same product is "reasonably interchangeable" with itself (Pet. App. A10), the court of appeals can hardly be faulted for not also spelling out why it is analytically incoherent to address, as petitioners insist, the cross-elasticity of demand between a product and itself.

2. In concluding that "an antitrust plaintiff may not narrow a relevant product market to a select group of customers without identifying a difference in the *product* supplied to that group of customers" (Pet. App. A11) (emphasis in original), the court of appeals followed the Eleventh Circuit decision in *T. Harris Young*, which previously had held that, "[w]hile a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the *product* sold to those customers" (931 F.2d at 824 (emphasis in original)). Although petitioners assert that *T. Harris Young* was wrongly decided (Pet. 17-18), they do not cite a single lower-court opinion, much less a single court of appeals opinion, with which it is inconsistent. To our knowledge, the few lower-court cases addressing the issue are all consistent with the decision below and *T. Harris Young*. *See Smalley & Co. v. Emerson & Cuming, Inc.*, 808 F. Supp. 1503, 1512 (D. Colo. 1992) (granting summary judgment) ("a single product *sold to a single customer*, given uncontested

evidence of other consumers of that product, cannot represent the relevant product market"(emphasis in original)), *aff'd*, 13 F.3d 366, 368 (10th Cir. 1993) ("Other consumers must be accommodated in determining the relevant product market."); *Redmond v. Missouri Western State College*, No. 84-6139, 1988 WL 142119, *2 (W.D. Mo. Nov. 2, 1988) ("it seems unprecedented to allow a claim that a defendant has monopolized a class of customers as distinguished from a product or service").

Petitioners err in contending (Pet. 15-17) that the decision below and *T. Harris Young* are inconsistent with this Court's decision in *Kodak*. The market definition question addressed in *Kodak* — whether markets for service and parts can be distinct for antitrust purposes (*see* 504 U.S. at 462-63) — simply has nothing to do with the question presented here. Equally irrelevant is this Court's holding that lack of market power in an equipment market does not foreclose, as a matter of law, the possibility of market power in an aftermarket for parts. *See id.* at 465-77. As explained above, the decisions below and in *T. Harris Young* do not rest on a court's assessment of what makes "'economic sense,'" *id.* at 467 (citation omitted), but on the straightforward legal proposition that "identical" products, even if sold to different customers, must be reasonably "interchangeable." Pet. App. A10. Far from undercutting that proposition, *Kodak* confirms that the relevant market must include "'products that have reasonable interchangeability.'" 504 U.S. at 482, quoting *du Pont*, 351 U.S. at 404.

Petitioners also err in suggesting (Pet. 18-19, 21-22) that this Court has approved product markets defined solely by reference to customers. In every case cited by petitioners, the market was defined by reference to *product* characteristics, and by application of the standard criterion of reasonable interchangeability. *See, e.g., NCAA v. Board of Regents of*

Univ. of Okla., 468 U.S. 85, 95 (1984) (live college football television; "alternative programming has a significantly different and lesser audience appeal" (citation omitted)); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356-57 (1963) (commercial banking services sufficiently "distinctive" to constitute product market); *International Boxing Club*, 358 U.S. at 251 (championship boxing; "nonchampionship fights are not 'reasonably interchangeable for the same purpose' as championship contests" (quoting *du Pont*, 351 U.S. at 395)); *United States v. Paramount Pictures*, 334 U.S. 131, 172-73 (1948) (first-run feature films, which "constitut[e] the cream of the exhibition business").

3. Petitioners' final argument (Pet. 23-30) is that the courts below misapplied the seven "practical indicia" set forth in *Brown Shoe* to the facts of this case. For at least three different reasons, that contention warrants no further review. First, it is, on its face, highly factbound. Second, it repeatedly rests on the premise that, even though all restaurants purchase the same beverage *products*, locally-owned restaurants purchase beverage *services* that are typically more extensive than those purchased by regionally-owned and nationally-owned restaurants. That premise, however, is inconsistent even with petitioners' amended complaint, which contained "no allegation that the products *and services* provided to such restaurants differed from the products *and services* provided to locally owned restaurants." Pet. App. A2 (emphases added). This Court should not grant review to permit petitioners to change their factual allegations yet again. Finally, even assuming that this factbound argument had been properly preserved, it is meritless in any event. As the court of appeals explained, even this "total services" argument "does not explain why the submarket should be limited to taverns and locally owned restaurants," because "[t]here is no allegation that non-locally owned restaurants could not use all of the services provided by Multi-Flow." Pet. App. A10-A11. Nothing in that analysis, or

in the remainder of the court of appeals' straightforward unpublished affirmance, warrants any further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT P. DUCATMAN
JONES, DAY, REAVIS & POGUE
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

GREGORY G. KATSAS
(Counsel of record)
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondent
Multi-Flow Dispensers of
Ohio, Inc.

September 1999